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KERAJAAN MALAYSIA

v.

PJBUMI COMPOSITES SDN BHD

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HIGH COURT MALAYA, SHAH ALAM
SOFIAN ABD RAZAK J
[CIVIL SUIT NO: 21NCVC-15-02/2012]
1 SEPTEMBER 2012

C ***CIVIL PROCEDURE:*** *Summary judgment - Income tax - Claim for arrears of taxable income due and payable under self-assessment scheme - Whether trible issues raised - Rules of the High Court 1980, O. 14 r. 1*

REVENUE LAW: *Income tax - Arrears of tax - Estimated taxable income - Monthly equal instalments payable until full settlement - Default of payment - Increased sum equal to 10% of amount unpaid - Whether entitled to increase under provisions of Income Tax Act 1967 - Details of calculation for increase of 10% on unpaid estimate of tax - Whether plaintiff unlawfully and improperly amended claim amount - Income Tax Act 1967, s. 107C(8)*

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The plaintiff was notified by the defendant that its estimated taxable income for the year of assessment 2002 was RM680,716. Pursuant to s. 107C(8) of the Income Tax Act 1967 ('the said Act'), the plaintiff served a notice to the defendant, directing the latter to pay the said sum by equal instalments payable on or before the 10th of every month until full settlement. The defendant then submitted an amended estimate of tax payable for the year of assessment 2002 of RM1,192,700 to the plaintiff. With the difference of RM440,846.04, the amended estimated tax payable for the year of assessment 2002 was less than the estimated tax payable which was submitted earlier but exceeded the total amount of monthly instalments payable before the amended estimate of tax payable. However, the defendant was still required to make equal monthly instalments payment. When the defendant failed to pay part of the installment, the plaintiff invoked s. 107C(9) of the said Act and imposed an increased sum equal to 10% of the amount unpaid. The defendant then submitted Form C to the plaintiff which stated that for the year of assessment 2002, an estimate tax due and payable was

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RM1,658,604. Taking into account the amount of instalments payable to the plaintiff was RM397,560, the balance of unpaid amount was RM1,261,044.08. On the balance unpaid amount, the plaintiff imposed an increase of 10% which came to a sum of RM126,104. Since the defendant failed to pay RM1,261,044 on or before the due date, a further increase of 5% was imposed and the plaintiff further imposed the increase amount of RM69,357.42. The plaintiff claimed that it was entitled to the increase of 10%, 10% and 5% pursuant to s. 107C(9), (10) and s. 103(4) of the said Act respectively without further notice on the unpaid amount due and payable in the sum of RM1,400,674.99. The plaintiff filed an application for summary judgment pursuant to O. 14 r. 1 of the Rules of the High Court 1980 claiming the sum of RM1,400,674.99 being arrears of taxable income due and payable under the self- assessment scheme. The issues that arose for the court's determination were (i) the details of the calculation for the increase of 10% on the unpaid estimate of tax; and (ii) whether the plaintiff had unlawfully and improperly amended the claim amount.

Held (allowing plaintiff's application with costs):

(1) The plaintiff had fulfilled all the requirements for the application, and the burden shifted on the defendant to show a triable issue. However, there were no triable issues raised by the defendant and no *bona fide* defence shown to warrant the plaintiff's claim to go for trial. (paras 18 & 35)

(2) In the normal procedure of a new management taking over from the defendant's previous management, a corporate diligence exercise should have been carried to determine the extent of the defendant's income tax liability. Had a corporate diligence exercise been carried out, it would show that from the defendant's income tax record, there was a Form CP 205 issued by the plaintiff to the defendant for the year of assessment 2002 which was a notice of equal instalment payment of income tax due and payable by the defendant amounting to RM1,633,546.04. If the would be new management had seen Form CP 205, then perhaps the extent of the income tax implication of the defendant would have been realised and could decide whether it was financially viable

A to take over from the previous management. The defendant having taken over the management of the defendant in March 2008 did so at its own perils. (para 20)

(3) Pursuant to s. 106(1) of the said Act, the plaintiff was entitled B to recover tax due and payable by civil proceedings as a debt due to the government. The defendant having stated that the income tax due and payable was incurred by the previous management, but had made instalment payments of RM167,325,21 for the year of assessment 2002. (para 21)

C **(4)** The plaintiff's claim was not pre-mature as the scheme of monthly instalment payments by the defendant was not agreed upon by the plaintiff. It was quite clear that there was no other document to indicate that the plaintiff had agreed to accept the sum of RM30,000 as monthly instalment payments D except what was shown in Form CP 205. The agreement to accept the monthly instalment payments by the plaintiff was on the basis that pursuant to Form CP 205, the defendant pays the sum of RM136,128,00 until full settlement. However, the defendant had issued monthly post-dated cheques in the E sum of RM30,000 only. The plaintiff had only accepted four of the said post-dated cheques amounting to RM120,000 and returned the rest to the defendant allegedly that the said payment was made without the knowledge of the plaintiff. (para 22)

F **(5)** The defendant had not exercised its right to dispute the increases of the unpaid income tax due and payable with the plaintiff or the Special Tax Commissioners. In that sense, the defendant was stopped from challenging the amount as G stipulated in the certificate issued under s. 142(1) of the said Act. Be that as it may, the increases made by the plaintiff were imposed upon the failure to make settlement on the date due by the defendant on the unpaid amount. If the defendant wished to dispute that the amount of tax sought to be H recovered was excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4) or (5) of the said Act, the proper avenue was to take up the dispute by way of an appeal to the Special Income Tax Commissioners which was what had been in place in the scheme of Income Tax

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legislature. It is only in relation to any disputes on questions of law at the hearing before the Special Income Tax Commissioners that the matter can be brought to the High Court by way of case stated. (paras 27, 28 & 34)

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(foll)***

Chong Woo Yit v. Government of Malaysia [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9 SC ***(refd)***

Government of Malaysia v. Dato' Mahindar Singh [1995] 1 LNS 323 HC ***(refd)***

National Company for Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(foll)***

Legislation referred to:

Income Tax Act 1967, s. 103(1A), (3), (4), (5), (6), (7), (8), (12), 106(1), (3), 107C(8), (9), (10), 142(1)

Rules of the High Court 1980, O. 14 r. 1

For the plaintiff - Noor Faezah Zainordin; FC

For the defendant - Jamadi Saleh; M/s Jamadi Fauzi Firdaus Abdullah

Reported by Najib Tamby

JUDGMENT

Sofian Abd Razak J:

Preliminary

[1] Income tax refers to an amount of tax that an individual or company is obligatory to fulfill according to their annual income. The amount is determined according to Inland Revenue Board (hereinafter called 'the IRB') graduated scale. The IRB evaluates taxpayers' liability in two different methods that are formal assessment system and also self assessment system. Formal assessment is whereby taxpayers need to fill up forms to affirm their income. Later on the taxpayer are required to pass the forms back to the IRB. The IRB will determine the final assessment and the taxpayer will receive a notice of assessment. While in self assessment system which came into effect from the year 2001, taxpayers also need to fill up forms before submitting it back to

the IRB assessing their own tax liability and pay taxes based on the disclosed figures as they earned. No notice of assessment would be issued to taxpayers. Instead, taxpayers need to fulfill the required amount through monthly payments before the due date. The amount is based on the estimation by the taxpayers themselves. The responsibility of correctly assessing the tax liability is transferred from the IRB to the taxpayers.

The Application

[2] The plaintiff filed an application for summary judgment pursuant to O. 14 r. 1 of the Rules of the High Court 1980 claiming the sum of RM1,400,674.99 being arrears of taxable income due and payable under the self assessment scheme. On 7 August 2012 the court after perusing the said application and the affidavits filed herein and reading the written submissions by both parties, allowed the plaintiff's application with costs of RM2,000. The defendant who was dissatisfied with the said decision has since filed an appeal to the Court of Appeal.

Factual Matrix Of Case

[3] The claim by the plaintiff against the defendant is the sum of RM1,400,674.99 being arrears of taxable income under the self assessment scheme for the year of assessment 2002 inclusive of the increase under the Income Tax Act 1967 (hereinafter called 'the said Act') that was due and payable. Having taken into account the payment made in the year of assessment 2011 and 2012 respectively, the balance amount claim is the sum of RM1,280,674.99.

[4] On 7 December 2001, the defendant had submitted to the plaintiff Form CP204 in respect of an estimate of tax payable for the year of assessment 2002 and notified the plaintiff that an estimate taxable income for the year of assessment 2002 was RM680,716.

[5] Nevertheless on 18 January 2002, the plaintiff had served a notice pursuant to s. 107C(8) of the said Act directing the defendant to pay the said sum by equal instalments payable on or before the 10th of every month until full settlement as follows:

No.	Date of Payment	Monthly amount of instalments (RM)
1.	10 February 2002	136,128.00
2.	10 March 2002	136,128.00
3.	10 April 2002	136,128.00
4.	10 May 2002	136,128.00
5.	10 June 2002	136,128.00
6.	10 July 2002	136,128.00
7.	10 August 2002	136,128.00
8.	10 September 2002	136,128.00
9.	10 October 2002	136,128.00
10.	10 November 2002	136,128.00
11.	10 December 2002	136,128.00
12.	10 January 2003	136,128.00
Total		**1,633,546.04**

[6] On 25 September 2002, the defendant had submitted to the plaintiff an amended estimate of tax payable for the year of assessment 2002 of RM1,192,700.

[7] The amended estimate tax payable for the year of assessment 2002 was less than the estimate of tax payable submitted earlier but exceeded the total amount of monthly instalments payable before the amended estimate of tax payable. The difference in the estimate of tax payable as amended and with that of the amount not amended was RM440,846.04 and the defendant was still required to make equal monthly instalments payment as follows:

No.	Date of Payment	Monthly amount of instalments (RM)
1.	10 February 2002	136,128.00
2.	10 March 2002	136,128.00
3.	10 April 2002	136,128.00
4.	10 May 2002	136,128.00
5.	10 June 2002	136,128.00

No.	Date of Payment	Monthly amount of instalments (RM)
6.	10 July 2002	136,128.00
7.	10 August 2002	136,128.00
8.	10 September 2002	136,128.00
9.	10 October 2002	25,919.00
10.	10 November 2002	25,919.00
11.	10 December 2002	25,919.00
12.	10 January 2003	25,919.00
	Total	**1,192,700.00**

[8] The defendant had failed to pay part of the installment of the estimate tax payable for the year of assessment 2002 which was due and payable on the due date. Section 103(12) of the said Act stipulates that the due date to mean the last day of the sixth month from the date following the closing of the accounting period. Due to failure on the part of the defendant to pay monthly instalments of the estimate tax due and payable, the plaintiff invoked the provision of s. 107C(9) of the said Act and imposed an increased by a sum equal to 10% of the amount unpaid.

[9] Section 107C(9) States As Follows:

> Where any instalment amount due and payable has not been paid by the due date or on the date specified by the Director-General, the amount unpaid shall, without any further notice being served, be increased by a sum equal to ten per cent of the amount unpaid, and the amount unpaid and the increase on the amount unpaid shall be recoverable as if it were tax due and payable under this Act.

[10] The increase by a sum equal to 10% of the amount unpaid of RM1,251,071 recoverable are as follows:

No.	Date of Payments	Monthly amount of instalments (RM)	10% increase
1.	10 February 2002	136,128.00	13,612.80
2.	10 March 2002	136,128.00	13,612.80
3.	10 April 2002	136,128.00	13,612.80
4.	10 May 2002	136,128.00	13,612.80
5.	10 June 2002	136,128.00	13,612.80
6.	10 July 2002	136,128.00	13,612.80
7.	10 August 2002	136,128.00	13,612.80
8.	10 September 2002	136,128.00	13,612.80
9.	10 December 2002	25,919.00	2,591.90
		Total	**111,494.30**

[11] On 13 August 2003, the defendant had submitted the Form C to the plaintiff which states that for the year of assessment 2002 an estimate tax due and payable was the sum of RM1,658,604.

[12] Having taken into account the amount of instalments payable to the plaintiff in the sum of RM397,560 the balance of unpaid amount was the sum of RM1,261,044.08 due and payable for the year of assessment. On the balance unpaid amount, the plaintiff had imposed an increase of 10% on the unpaid amount which came to a sum of RM126,104. In view 'that the defendant had failed to make payment of RM1,261,044 on or before the due date, a further increase of 5% was imposed and the increase amount imposed by the plaintiff was in the sum of RM69,357.42. The plaintiff claimed that it was entitled to the increase of 10%, 10% and 5% pursuant to s. 107C(9), s. 107C(10) and s. 103(4) of the said Act respectively without further notice on the unpaid amount due and payable in the sum of RM1,400,674.99.

A **The Defendant's Case**

Issues Raised

(a) The Increase At 10% On The Unpaid Estimate Of Tax – Where Are The Details Of Calculation

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[13] It was the contention of the defendant that in imposing an increase of 10% on the unpaid amount which amounted to RM111,494.30, the plaintiff had not provided any detail of calculation as to how the said amount was arrived at. C Learned counsel argued that the said amount cannot be any figure 'pluck from the thin air'. Without the detailed calculation on how this sum was arrived at, the defendant is deprived of its right to ascertain whether the calculation made by the plaintiff for the year of assessment 2002 was correct and accurate.

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(b) The Plaintiff Had Unlawfully And Improperly Amended Or Improvised The Claim Amount

[14] The plaintiff was alleged to have unlawfully and improperly amended or improvised the said amount claimed of RM1,280,674.99 E without informing the defendant nor did the defendant obtain leave to amend despite the said amount of claim as stated in the writ, amended statement of claim of RM1,400,674.99 which is an element of surprise to the defendant. The defendant also questioned why there were two certificates certifying the amount F due and payable pursuant to s. 142(1) of the said Act which show a different amount in the two certificates. The earlier certificate dated 18 June 2012 shows that the amount due and payable by the defendant to the plaintiff is RM1,400,674.99 and the second certificate issued dated 23 July 2012 is the sum of G RM1,280,674.99. In view of the two certificates showing two different figures at two different dates, the plaintiff's calculation on the amount due and payable could not be incorrect.

[15] Further the statement of defence *inter alia* states that the H defence had taken over the management of the defendant company and the unpaid amount of income tax due and payable and claimed by the plaintiff was incurred by the previous management in March 2008. Had the plaintiff claimed for the unpaid income tax due and payable in the year of assessment 2002, then perhaps I there was no necessity to impose a levy of 10%, 10% and 5%

increases respectively. It was after the defendant had taken over the management of the defendant in March 2008 that the plaintiff is claiming for the unpaid income tax due and payable.

[16] Learned counsel for the defendant submits that in view of the issues raised, it is not a plain and obvious case in which the court should exercise its discretion for summary judgment against the defendant. The defendant needs to show the court that there is a *bona fide* defence and raise a triable issue, though a complete defence need not be shown.

Decision Of The Court

[17] In an application for summary judgment, it is perhaps useful to be reminded of a *dicta* in *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 where the Federal Court held as follows:

> In every application under Order 14, the first considerations are (a) whether the case comes within the Order and (b) whether the Plaintiff has satisfied the preliminary requirements for proceeding under Order 14. For the purposes of an application under Order 14 the preliminary requirements are:
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> (i) the Defendant must have entered an appearance;
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> (i) the Statement of Claim must have been served on the Defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.
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> ... If however, these considerations are satisfied, the Plaintiff will have established a *prima facie* case and he comes entitled in judgment. The burden then shifts to the Defendant to satisfy the Court why judgment should not be given against him.

[18] The court is satisfied that the plaintiff had fulfilled all the requirements for the application, and the burden is shifted on the defendant to show a triable issue.

[19] The defendant in its defence has broadly stated that the unpaid income tax due and payable was incurred by the previous management in the year of assessment 2002 and the plaintiff should have claimed from the previous management then.

[20] The court was of the view that in the normal procedure of a new management taking over from the previous management of the defendant, a corporate diligence exercise should have been carried out to determine the extent of the defendant income tax liability. Had a corporate diligence exercise been carried out it would show that from the defendant's income tax record, there was a Form CP 205 dated 18 January 2002 issued by the plaintiff to the defendant for the year of assessment 2002 which was a notice of equal instalment payment of income tax due and payable by the defendant amounting to RM1,633,546.04 (see exh. 'JM3'). If the would be new management had seen the Form CP 205, then perhaps the extent of the income tax implication of the defendant would have been realised and could decide whether it was financially viable to take over from the previous management. The defendant having taken over the management of the defendant in March 2008 did so at its own perils.

[21] The income tax liability of a corporation continues regardless of a change in the corporate structure. Likewise in the instant case, a change in the corporate structure in March 2008 will not absorb or exempt defendant from tax liability incurred by the previous management. Pursuant to s. 106(1) of the said Act, the plaintiff is entitled to recover tax due and payable by civil proceedings as a debt due to the government. The defendant having stated that the income tax due and payable was incurred by the previous management, but had made instalment payments of RM167,325,21 for the year of assessment 2002.

[22] The defendant further states that the plaintiff's claim is premature because after the defendant had taken over the management of the defendant, the plaintiff had agreed to the instalment payment. The plaintiff nevertheless had refused to accept the defendant's instalment payment of RM30,000 monthly by post dated cheques and returning the same to the defendant. The court observed that the agreement to accept the monthly instalment payments by the plaintiff was on the basis that pursuant to the Form CP 205 the defendant pay the sum of RM136,128 until full settlement. However the defendant had issued monthly post dated cheques in the sum of RM30,000 only. The plaintiff had only accepted four of the said post dated cheques amounting to RM120,000 and returned the rest to the defendant allegedly that the said payment was made without the

knowledge of the plaintiff. The court was of the view that the plaintiff's claim was not pre matured as the scheme of monthly instalment payments by the defendant was not agreed upon by the plaintiff. It was quite clear that there was no other document to indicate that the plaintiff had agreed to accept the sum of RM30,000 as monthly instalment payments except what was shown in Form CP 205 (exh. 'JM3').

[23] The other complaint by the defendant related to the fact that the plaintiff in exercising its right under s. 107C(9), (10) and s. 103(4) of the said Act, to increase the unpaid income tax amount due and payable by 10%, 10% and 5% respectively had not shown how those increases were calculated or were they 'figures just pluck the air.'

[24] It is perhaps best that taxpayers understand that philosophy of the income tax regime in placed in our tax system. This is how it operates, if taxpayers disagree with the finding of the plaintiff, the taxpayers can first contact the plaintiff to raise their disagreement. The plaintiff will reassess the documents, records and computations of its initial finding. If after the assessment and the plaintiff maintains its findings, the taxpayers have the right to bring the dispute to the Special Commissioners of Income Tax. If the taxpayers are not satisfied with the findings of the Special Commissioners of Income Tax, then the taxpayers can appeal against that finding to the High Court.

[25] In the instant case, the dispute is on the increases by the plaintiff on the unpaid amount of income tax due and payable. There is no dispute on the amount of estimate income tax due and payable of the defendant pursuant to the notice in Form CP 204 served by the defendant on the plaintiff.

[26] The court wish to refer to s. 106(3) of the said Act, which stipulates 'that in any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under sub-s. 103(1A), (3), (4), (5), (6), (7) or (8).

[27] It is quite apparent that from the facts of the instant case, the defendant had not exercised its right to dispute the increases of the unpaid income tax due and payable with the plaintiff or the

Special Tax Commissioners. In that sense, the defendant is stopped from challenging the amount as stipulated in the certificate issued under s. 142(1) of the Act.

[28] Be that as it may, the increases made by the plaintiff were imposed upon the failure to make settlement on the date due by the defendant on the unpaid amount.

[29] In *Chong Woo Yit v. Government of Malaysia* [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9 the court held that on the service of a notice of assessment on the person assessed, the tax payable under the assessment becomes due and payable whether or not the person appeals against the assessment and would be recoverable by the government by civil proceedings as a debt due to the government. On such civil proceedings brought by the government, the court, unlike the Special Commissioners of Income Tax, the court has no power to ascertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased.

[30] In the instant case the plaintiff had issued two certificates stating the amount of income tax due by the defendant. The amount as stated in the certificate dated 18 June 2012 was the sum of RM1,400,674.99 and whereas the certificate dated 23 July 2012 was the sum of RM1,280.674.99. The difference between the two certificates was RM200,000. In the statement of claim, the plaintiff is claiming from the defendant the sum of RM1,400,674.99.

[31] The plaintiff had explained in para. 17 of the affidavit in support (encl. 14) that by tabulating how the figure of RM1,400,674.99 came about which was consistent with the amount claimed in the statement of claim. The only issue here is the fact that two certificates issued bearing two different dates whereby the earlier certificate states the amount due and payable of RM1,400,674.99 and the later showing an amount due and payable of RM1,280,000. I suppose the defendant's argument is that the latest certificate should have been applicable. This is where the court is helpless in that there is no room for the court not to entertain the defendant's objection at this juncture as this is clearly prohibited under s. 106(3) of the Act as discussed earlier.

[32] In *Government of Malaysia v. Dato' Mahindar Singh* [1995] 1 LNS 323 where the court held that 'the said certificate is expressly provided to be sufficient evidence of the amount of taxes due from the defendant and gives the court sufficient judgment for the amount. The intention of the legislature is clearly to overcome any plea by any taxpayer as is now raised by the defendant herein in order to delay payment of the tax. For the court to entertain such plea would be to go against the express word of the Act'.

[33] The court is also mindful of the reminder issued by Mohamad Azmi SCJ in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 where His Lordship said:

> Under an Order 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or disputed contemporary documents or other statements by the same deponent, or is equivocal or lacking in precision or is consistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an Order 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[34] The court in applying the above stated principle to the facts of the instant case held that, if the defendant wished to dispute that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s. 103(4) or (5) of the said Act, the proper avenue was to take up the dispute by way of an appeal to the Special Income Tax Commissioners which is what has been in place in the scheme of income tax legislature. It is only in relation to any disputes on questions of law at the hearing before the Special Income Tax Commissioners that the matter can be brought to the High Court by way of case stated.

[35] The court held that there are no triable issues raised by the defendant and no *bona fide* defence shown to warrant the plaintiff's claim to go for trial. The court in all the circumstances, hereby allowed leave to the plaintiff to enter final judgment as per the claim with interest at 4% per annum from date of judgment till realisation and costs of RM2,000 payable to the plaintiff.